No. 06-97

FILED
SEP 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STOLT-NIELSEN, S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
and RICHARD B. WINGFIELD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a corporation, which has self-reported its own misconduct to the government pursuant to an immunity agreement which promises that the corporation and its employees will not be prosecuted, may thereafter be indicted without opportunity to seek judicial review and enforcement of the government's promise, on the ground that post-indictment review is an adequate remedy at law.

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INTERESTS OF THE *AMICI*

The Chamber of Commerce of the United States of America ("Chamber"), and the Association of Corporate Counsel ("ACC"), have a substantial interest in expressing the views of the American business community and the lawyers who advise it regarding federal programs which promise significant benefits to corporations that cooperate with law enforcement officials, the foremost benefit being an immunity from the threat of a criminal indictment.[1] Their views are particularly important in a case such as this where the stigma resulting from the government's accusations against the petitioners may obscure the importance and impact of the issue to the business community at large. Criminal indictments cause dislocation and damage that reach far beyond the particular company involved and inflict injury on innocent corporate constituents such as employees, retirees, shareholders, suppliers and customers. These groups have an interest in whether the government should be permitted to inflict irreparable damage on a company. Furthermore, when such indictments issue after the government has made an express promise not to prosecute, it erodes respect for federal law enforcement. It is appropriate, therefore, that the organized business community be heard on government conduct that can have such a severe impact on American businesses.

The Chamber is the nation's largest federation of business companies and associations, representing an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the

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[1] Pursuant to Rule 37.6, no counsel for a party to this case authored any part of this brief, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief, and their consent letters are on file with the Clerk of the Court.

Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving cases of national concern to the American business community.

The ACC, formerly known as the American Corporate Counsel Association, or ACCA, was formed in 1982 as the bar association for in-house counsel. With over 20,000 members from over 8,400 private sector organizations in 57 countries, ACC members represent a broad range of domestic and international public, private, and not-for-profit companies. Its members represent 98 of the Fortune 100 companies; internationally, its members represent 74 of the Global 100 companies. One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal practice and, specifically, the ability of its members to fulfill their functions as leading legal and compliance counselors to their corporate clients.

Federal law enforcement policy over the past generation has encouraged corporations to report their misconduct in exchange for a promise that the corporations will avoid the irreparable damage that results from a criminal indictment, including potential disqualification from federal and state procurement, loss of customers, decreased access to capital markets and possible collapse. The Department of Justice has capitalized upon the concerns of corporate America through its Antitrust Division's Leniency Program. Under that program, the first corporation to report wrongdoing receives complete amnesty, while corporations that are not the first to report do not receive the same degree of leniency. The purpose of this program is to create a strong incentive for corporations to self-report antitrust violations. Yet the decision to self-report is a very difficult one, and whether a corporation decides to do so rests in large part on whether it has confidence that the government will honor its promises or, if the government fails to do so, that the federal courts will

be open to hear the corporation's grievances *before* damage is done.

The court of appeals decision shatters that confidence by closing the courthouse doors. It bars any pre-indictment review of the government's finding of breach of a leniency agreement and gives the government *carte blanche* to indict a corporation, even after that corporation has provided damning evidence about itself—which makes a successful defense hopeless—as well as information leading to the criminal convictions of others. If history is any guide, the immense and rising pressure from a criminal indictment then brings the company to its knees and forces a plea to a lesser offense, with the result that the aggrieved corporation never has its day in court. *Put another way, post-indictment review for the modern corporation is often no review at all.*

If the government can arbitrarily breach its agreement not to indict in this case, after it received the full benefit of its bargain (and received the very evidence that it will now use against the corporation), it can *a fortiori* breach its agreement in any case, under any pretext, knowing that no pre-indictment remedy is available in the courts. The court of appeals ruling has thus put corporate management and corporate lawyers in the untenable position of deciding whether to be good corporate citizens, abandon available defenses and cooperate with law enforcement, while being aware that there is no effective manner of enforcing the government's corresponding promise not to indict.

This case, accordingly, presents the Court with the opportunity to assure the business community that it has some opportunity, however limited, to be heard before the government acts unfairly. Contrary to the court of appeals ruling, no separation of powers concerns bar a district court from enforcing the government's leniency agreement, and ordering the remedy of specific performance, when the court de-

termines (as the district court did here) that no breach of contract has occurred.

STATEMENT

1. Petitioner Stolt-Nielsen Transportation Group is a world-wide supplier of parcel tanker shipping services. In early 2002, its general counsel resigned after advising his superiors of collusive trading practices between petitioner and its two competitors. Petitioner thereafter approached the Antitrust Division of the United States Department of Justice about obtaining leniency through the Division's Corporate Leniency Policy. Under this program, the government covenants not to charge a firm for the activity being reported, so long as several qualifying conditions are met—including the applicant's representation that upon discovery of the wrongdoing, the corporation took prompt and effective action to terminate the illegal activity. (Pet. App. 41a.)

The Department accepted petitioner into the leniency program and, by letter of January 15, 2003, entered into a binding contractual agreement with petitioner, agreeing not to prosecute the corporation or its employees, officers or directors "for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." (Pet. App. 41a.) The Department, however, maintained the right to declare the agreement void, should petitioner violate its obligations and, in such circumstances, to prosecute petitioner.[2]

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[2] The Corporate Conditional Leniency Letter provided that in the event of a failure to fully comply with the terms of the Agreement, the Agreement would be void and could be revoked by the Antitrust Division. "Should the Antitrust Division revoke the conditional acceptance of SNTG into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against SNTG, without limitation. Should such a prosecution be initiated, any documents or other information provided by any current or former director, officer or

Despite fully cooperating with the government, and aiding in the government's conviction of two other corporations, the Department notified Stolt-Nielsen on April 8, 2003, that it was suspending its own obligations under the agreement. On March 2, 2004, the government officially withdrew its grant of leniency. The Department did not assert that petitioner failed to honor its commitment to deliver information and assistance to the government. Rather, the government claimed that petitioner, and in particular Richard B. Wingfield, the company's former Managing Director for Tanker Trading, represented that the corporation's anticompetitive activity ceased in March 2002, when it actually continued until October 2002. This was viewed as a breach of petitioners' representation that, upon discovery of the wrongdoing, prompt and effective action was taken to terminate the illegal activity. The same day that leniency was formally revoked, the government announced its intention to indict both Stolt-Nielsen and Wingfield for violations of the Sherman Act. (Pet. App. 8a.)

2. On February 6, 2004, petitioners Stolt-Nielsen and Wingfield filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of their rights under the agreement, and requesting declaratory and injunctive relief. After an evidentiary hearing, in which the government participated, the court determined that the agreement had not been breached. Accordingly, the court enjoined the government from prosecuting petitioners "for the anticompetitive activity through January 15, 2003." (*Id.*)

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employee of SNTG to the Antitrust Division pursuant to this Agreement, may be used against SNTG in any such prosecution." (Pet. App. 68a.)

3. A two judge panel[3] of the Third Circuit reversed. The court concluded that the separation of powers between the Executive and Judicial branches barred the use of an injunction to prevent the government from seeking an indictment; that immunity agreements protect only against conviction, not indictment; and that petitioners were confined to their post-indictment remedies at law. (Pet. App. 15a, 20a.) The court did not consider whether the district court erred in its finding that petitioner had not breached the leniency agreement. (*Id.* at 21a.) An order amending the court's opinion issued on May 16, 2006. (Pet. App. 23a-25a.) A timely petition for rehearing and rehearing *en banc* was denied on June 20, 2006. (Pet. App. 30a-31a.)

On June 23, 2006, the court of appeals denied petitioners' motion to stay the mandate pending certiorari. (Pet. App. 32a-33a.) On July 20, 2006, petitioners filed a timely petition for a writ of certiorari with this Court and applied to Justice Souter to recall and stay the court of appeals mandate. The motion was denied by Justice Souter on July 26, 2006. A renewed motion was then made to Justice Stevens who referred the motion to the full Court. On August 21, 2006, the Court issued an order denying petitioners' motion.

On September 6, 2006, a grand jury returned an indictment against the petitioners.[4]

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[3] Justice Samuel A. Alito, Jr. was a member of the panel that heard the case, but was thereafter appointed to this Court.

[4] A discussion as to why this case is *not* moot appears *infra* at p.14.

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS DECISION IS WRONG BOTH AS A MATTER OF LAW AND POLICY

A. An Indictment Can Have Devastating Consequences for a Corporation, and Thus a Post-Indictment Motion To Dismiss Is Not an Adequate Remedy.

It is hardly news that the indictment of a corporation, coupled with adverse publicity, potential loss of various licenses and rights, disaffection of suppliers, customers, and financing institutions that might otherwise arrange loans, and possible suspension from government contracts, can be catastrophic, no matter how the criminal process ultimately concludes. The case of the former accounting giant Arthur Andersen is illustrative. As Kurt Eichenwald observed in *Conspiracy of Fools: A True Story*, his account of the fall of Enron and its associates, "[t]he Andersen indictment for obstruction of justice ended the company's last hope for survival. Clients fled in droves, unwilling to allow a firm charged with a crime to serve as their financial watchdog. Around the globe, Andersen partners jumped to competing firms. By the time of Andersen's conviction in June only a small shell of the once-great firm remained, and it announced that it would cease auditing public companies. . . . The death of Andersen triggered public criticism that the prosecutors had gone too far in charging the firm." Kurt Eichenwald, *Conspiracy of Fools: A True Story* (2005) 667.[5]

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[5] *See* Kurt Eichenwald, *Enron's Many Strands: The Accountants, Miscues, Missteps and the Fall of Andersen*, N.Y. Times, May 8, 2002, at C1 (observing that Arthur Andersen began to unravel after the indictment); Benjamin M. Greenblum, Note, "*What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*," 105 Colum. L. Rev. 1863, 1888 (2005) (reporting that Andersen

Andersen is not the only entity that has been adversely affected by an indictment. In May 2006, federal prosecutors indicted the law firm of Milberg Weiss. As a result of the indictment, some of the firm's most significant clients withdrew their business. For example, the Attorney General of Ohio required that Milberg Weiss withdraw as counsel for the Ohio Tuition Trust Authority. New York State Comptroller Alan G. Hevesi, the trustee of the $140 billion New York State Common Retirement Fund, forced Milberg Weiss to step down as lead counsel in a shareholder suit against German pharmaceutical giant Bayer, and removed Milberg Weiss from the pool of firms eligible to be retained by the Fund. *See* Anthony Lin, *Comptroller Seeks To Jettison Milberg as Pension Fund Counsel*, N.Y.L.J., June 2, 2006. As Columbia University law professor John C. Coffee Jr. observed, "[a] number of public pension funds, which are always publicity sensitive, will find it difficult to use a law firm that's been indicted." *See* Joel Rosenblatt, *Indicted Firm May Go Way of Andersen: Kickback Allegation Could Create Exodus of Clients*, San Diego Union Trib., May 20, 2006. In addition, a number of partners left the firm following the indictment. *See, e.g.*, Posting of Peter Lattman to Wall Street Journal on Line Law Blog, http://blogs.wsj.com/law/category/milberg-weiss (Sept. 11, 2006, 8:55 EST) ("Milberg Weiss continues to fight a battle to keep its talent from walking out the door. Since May, when the once-dominant class-action firm was indicted on fraud charges by a federal grand jury in Los Angeles, 20 of Milberg Weiss's partners have left or are leaving the firm—close to half the

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CEO Joseph Berardino told Justice Department officials "If you want to kill us, go kill us. If you want to keep us alive, we can get through this, but we can't take an indictment."). *See also* Lynnley Porowning, *U.S. Tactic On KPMG Questioned, Judge Criticizes Legal-Fee Cutoff*, N.Y. Times, June 28, 2006, at C1-C2 (observing that in the modern era, "an indictment is often a death knell for a company, as it was for KPMG's rival, Arthur Andersen.").

total."); *see also* Joel Rosenblatt, *Indictment May Doom Milberg Weiss Law Firm*, Seattle Times, May 20, 2006, *available at* http://seattletimes.nwsource.com/html/businesstechnology/2003007065_milbergweiss20.html ("The Milberg Weiss indictment is comparable to the charges made in 2002 against Arthur Andersen, which all but drove the fifth-largest accounting firm out of business, New York University law professor Stephen Gillers said.").

The American business community, therefore, must contend with the fact that an indictment can by itself have disastrous consequences, wholly apart from whether the corporation is ultimately found innocent of the charges. Andersen, after all, is today defunct, although this Court ultimately overturned its conviction. *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Eighty thousand innocent Andersen employees nonetheless lost their jobs.

The practical business consequences that can befall a corporation as a result of an indictment are numerous, and include the following categories of harm:

1. *Customer Relationships*.

Adverse publicity from an indictment can by itself affect relationships with other companies, with customers, with creditors, and with the general public. The effects can be particularly harsh for a company that trades on its reputation. *See* Eric Holder, *Don't Indict WorldCom*, Wall St. J., July 30, 2004, at A14; ("[F]or a firm that trades on its reputation . . . . the effect of the indictment and conviction was close to a death sentence."); *Andersen Pleads Not Guilty, As Workers Protest at Courthouse*, Wall St. J., Mar. 20, 2002, at C13 (quoting Andersen's lead trial attorney as saying that an indictment would be "just as bad as a conviction" in terms of reputational harm to the company); John C. Coffee, Jr. *Decoding the Andersen Incident: Myth and Reality*, N.Y.L.J.,

Apr. 5, 2002, at 1 ("[i]n comparison to an indictment, a deferred prosecution is far less stigmatizing"). Even beyond this, there is the possible loss of customers attributable to adverse publicity from an indictment. In Andersen, major clients left the company, and overseas offices began severing ties with the firm, after the indictment. Barbara Ley Toffler & Jennifer Reingold, *Final Accounting: Ambition, Greed and the Fall of Arthur Andersen* 219 (2003).

2. *Suspension from Government Programs.*

An indicted company may be suspended from doing business with the government, and may lose valuable government licenses. In Andersen's case, the corporation was aware that an indictment would threaten its viability since absent a waiver the SEC could ultimately bar Andersen from auditing public companies, and state regulators could revoke state licenses and impose other sanctions on the firm. *See* Jonathan Weil, Richard B. Schmitt & Devon Spurgeon, *Arthur Andersen Met With U.S., Hoping To Strike Agreement*, Wall St. J., Apr. 8, 2002, at C15.

Suspension from participating in federal programs can be devastating to a company. Under the Federal Acquisition Regulations ("F.A.R.") and the Nonprocurement Common Rule, an agency of the federal government may suspend a company from doing business with the federal government if (a) there is adequate cause and (b) immediate action is necessary to protect the Government's interest. F.A.R. 9.407-1(a), (b); Executive Order 12,549, 51 Fed. Reg. 6370 (Feb. 21, 1986) (setting forth Nonprocurement Common Rule). An indictment automatically constitutes "adequate evidence" for suspension. *See* F.A.R. 9.407-2(a)(7), (b) (providing that an indictment for any "offense indicating a lack of business integrity or business honesty" constitutes adequate cause for suspension). A suspension is generally government-wide. F.A.R. 9.407-1(d). A suspension based

upon an indictment is effective until the legal proceedings arising from that indictment are completed. F.A.R. 9.407-4.[6] Suspension from doing business with the government would be a matter of great consequence for a company like Stolt-Nielsen, one of the world's largest parcel tanker operators.

3. *Access to Capital Markets.*

Many companies depend at least in part on debt financing to provide the capital necessary to sustain their operations. An indictment often prevents a company from being able to obtain favorable, or indeed any, financing. An indictment may also cause currently outstanding loans to go into default. Without access to debt financing, a company may become insolvent. The presence of an indictment also affects the underwriting of any new loan that a company obtains. Lenders perform a credit assessment of prospective borrowers before financing is approved. If a company is under indictment, the credit assessment will require an analysis of the

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[6] In addition, a suspended company is restricted in conducting business with entities that receive federal funds. It may not act as a surety on federal programs. F.A.R. 28.203-7. An indicted company may be suspended from offering mortgages that are backed by the Department of Housing and Urban Development or by the Department of Veterans Affairs. 24 C.F.R. 25.5, 25.9(m), 200.229, 202.5(j); 38 C.F.R. 44.1105(b). The government may revoke or deny renewal of a company's facilities security clearance if it is suspended from participating in government contracts. Dep't of Defense Indus. Sec. Reg. DOD 5220.22-R §§ C2.1.12.7 and C2.1.19.10, *et seq.* (Dec. 4, 1985). Companies indicted for certain violations may also be denied licenses for the export or reexport of defense articles and defense services controlled under the Arms Export Control Act. 15 C.F.R. 764.3(c)(2)(ii)(A). Indicted companies may also be suspended from purchasing timber from the government. 36 C.F.R. 223.142(a)(2). Finally, state and local governments may also suspend contracting with an indicted company. *See, e.g.*, N.Y. Comp. Codes R. & Regs., Tit. 9, § 4-10(a)(1)(i) (2005) (indicted entities may be suspended from contracting with the City of New York while the indictment is pending).

likelihood of criminal liability, the potential cost of defending the suit, the potential extent of criminal liability, the impact of the indictment and potential conviction on the company's reputation, and the extent to which management resources will be diverted toward defending the company. A lender may decide not to issue financing at all, or may offer financing with terms less favorable than it would if the company were not under indictment. Indeed, many financing agreements require the borrower to represent that it is not under indictment, before obtaining the loan.[7]

Even if only one of a company's loans goes into default as a result of an indictment, it can trigger a domino effect that may endanger the company's entire financing structure. Many loans contain "cross-default" provisions that cause the loan to go into default if the borrower defaults on other loans or obligations. *See, e.g.*, Loan Agreement (Line of Credit) Between Wells Fargo Bank, N.A. and Advanced Materials, Inc., §10.1(d), *available at* http://contracts.onecle.com/admat/wells.credit.1996.11.26.shtml (triggering default if the borrower defaulted on any other debt or obligation in excess of $200,000). And even if a loan does not expressly contain such a provision, default may nonetheless result from the fact that as a practical matter, a default on one loan may constitute a "material adverse change" that triggers default on another loan. *See, e.g.*, Quickstart Loan and Security Agreement Between Silicon Valley Bank and Bombadier Software Inc., §5(f), *available at* http://contracts.onecle.com/avantgo/svbank.loan.1998.01.28.shtml.

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[7] *See, e.g.*, Revolving Line of Credit Loan Agreement (Accounts Receivable and Inventory) Between Schuff Steel Co. and Bank One, Az., § 5.1(f), *available at* http://contracts.corporate.findlaw.com/agreements/schuff/bankone.credit.1995.06.30.html.

4. *Damage to Shareholders and Employees.*

When a company suffers as a result of an indictment, its shareholders suffer as well, for the company's shares lose value. If the company becomes bankrupt, shares become worthless. Shareholders, moreover, generally do not share in the company's remaining assets as distributed by a bankruptcy court.

Employees also suffer when a company is indicted. An indictment is "a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees." *United States v. Stein*, 435 F. Supp. 2d 330, 381-382 (S.D.N.Y. 2006); *see also* James Comey, Deputy Att'y Gen., U.S. Dep't of Justice, Statement at Press Conference on Charges and Settlement Against America Online for Aiding and Abetting Securities Fraud (Dec. 15, 2004), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0412/15/lol.05.html) (touting deferred prosecutions as "minimiz[ing] the collateral consequences of an indictment, which would have been borne by innocent employees and investors."). Employee pension plans also may be put in jeopardy by an indictment.

In sum, the effects of an indictment can be devastating to a corporation, its employees, shareholders and customers. Accordingly, a post-indictment motion to dismiss is simply not an adequate remedy at law. The court of appeals conclusion that "the availability of dismissal after final judgment will adequately protect and secure for the defendant the benefit of his bargain under the non-prosecution agreement if he is entitled to it," (Pet. App. 20a) cannot be squared with the practical reality of how indictments adversely affect companies doing business in today's world.[8] A pre-indictment

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[8] Moreover, petitioners sought both injunctive and declaratory relief. An adequate remedy at law does not preclude declaratory relief, if that

remedy should be available, to guard against government arbitrariness, and to ensure the kind of predictability that corporations rely upon in their dealings with the United States.[9] The stakes are too high for corporations not to have access to the courts to construe and enforce leniency agreements prior to indictment.

The fact that an indictment has now occurred does not make the issues presented any less important; nor does the indictment render the case moot. There is a strong public interest in the Court's resolution of important precedential issues such as those presented by petitioners, an interest that clearly militates against a finding of mootness. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980). Moreover, although the petitioners have been indicted, the question is not whether the precise relief sought at the time the complaint was filed is still available, but whether the Court can grant effective relief. In this case, the district court may still grant effective relief by issuing a declaratory judgment that, based on its already-established findings of fact, petitioner was not in breach of its agreement with the government.

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relief is otherwise appropriate. *See* Fed. R. Civ. P. 57. *See also* 28 U.S.C. 2201(a); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-89 (1995).

[9] As many courts have recognized, the government's failure to honor its commitments does more than discourage others from seeking a plea bargain or immunity agreement. Violations of such agreements "directly involve the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government. . . ." *United States v. Riggs*, 287 F.3d 221, 226 (1st Cir. 2002) (*quoting United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997)).

B. The Court of Appeals Failed To Acknowledge that the Basis of the Bargain Was the Government's Commitment Not To Indict Petitioners.

Corporations that enter the leniency program must incriminate themselves, waive attorney-client privilege, turn over key documents, and fully cooperate with the Department of Justice in securing criminal convictions of competitors. What the corporation receives in return is immunity from indictment and prosecution, for as we have demonstrated the effects of an indictment can be devastating to a corporation.

The court of appeals erroneously ruled, however, that immunity and non-prosecution agreements "that have promised not to charge or otherwise criminally prosecute a defendant . . . protect the defendant against conviction rather than indictment and trial." (Pet. App. 14a.) This conclusion ignores the express terms of the leniency program, which grants a corporation protection from all criminal procedures including indictment so long as certain conditions are met. The Division defines "leniency" as "not *charging* such a firm criminally for the activity being reported" and notes that the policy is properly characterized as a grant of immunity. (Pet. App. 72a.) The Antitrust Division's Grand Jury Practice Manual expressly states that the term of art "lenient treatment" "*means not indicting such a firm.*" (Pet. App. 85a.) (emphasis added) Representatives of the Antitrust Division have described the Leniency Policy as "a complete pass from criminal prosecution or total immunity for a company and its cooperating employees," and have observed that "if a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain *and is not subject to the exercise of prosecutorial discretion.*" Scott D. Hammond, Dir. of Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstone of an Effective Leniency Program' "November 22, 2004", *available at* www.usdoj.gov/atr/public/speeches/206611.htm

(emphasis added). Accordingly, if the government's representations are to be credited, and the agreement worth the paper it is written upon, the leniency agreement must be construed as having protected petitioners from indictment. Permitting the government to indict petitioners, in the face of the express terms of the agreement, and notwithstanding petitioners' cooperation and compliance, undermines the confidence of corporations in the fairness of the process given by the government and ignores the practical reasons why the government's promise not to indict was so crucial to petitioners—and to all corporations who seek protection under the government's Leniency Program.

C. The Court of Appeals Decision Is Wrong as a Matter of Law and Eliminates any Mechanism for Enforcing Leniency Agreements Prior to Indictment.

The court of appeals erroneously determined that even though the district court, after a hearing, found that petitioners had not breached their agreement, separation of powers concerns barred the entry of equitable relief in favor of petitioners. While it is true that as a general principle the Executive Branch has absolute discretion whether to prosecute a case, it is equally true that once the Executive Branch knowingly exercises that discretion by entering into an immunity agreement it is bound to honor the agreement's terms, and separation of powers questions do not come into play. The government's prosecutorial discretion in this case was exercised when it accepted petitioner into the Leniency Program and executed the January 15, 2003 letter, which constituted a binding and enforceable agreement.[10] Ordering

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[10] *See United States v. Alegria*, 192 F.3d 179, 182 (1st Cir. 1999) ("As a general rule, nothing precludes a prosecutor from bargaining away something over which he has discretion in return for promises extracted

specific performance of that agreement, in conformance with well-established principles of contract law, does not offend the separation of powers doctrine. This Court has ruled, in the context of plea agreements, that the government must honor its promises insofar as the plea agreement rests "in any significant degree" on those promises. *Santobello v. New York*, 404 U.S. 257, 262 (1971). The Court has advised that specific performance of such agreements is among the arsenal of remedies available in district court. *Id.* at 263. Thus federal courts regularly order specific performance of plea agreements, looking to general principles of contract law. *See, e.g., United States v. Cimino*, 381 F.3d 124, 127 (2d Cir. 2004). The courts have, in such contexts, rejected separation of powers arguments, concluding, for example, that "the power of trial courts to order specific performance of plea agreements. . . . does not violate the doctrine of separation of powers, because it derives from the court's exercise of its supervisory powers." *United States v. Serubo*, 502 F. Supp. 290, 293 (E.D. Penn. 1980). *See also United States v. Lieber*, 473 F. Supp. 884, 895-96 (E.D.N.Y. 1979) (ordering specific performance of a plea agreement and rejecting the argument that the court's order interfered with the prosecutorial powers of the Executive Branch).[11]

Accordingly, this is a straight-forward case calling for the construction of an agreement between a corporation and the government, where the government clearly breached its promise not to indict, and petitioners relied to their detriment

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from a criminal defendant."); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993) ("[T]he government may bargain away its discretion.").

[11] That these cases involved plea agreements rather than immunity agreements, is of no consequence. As the court of appeals acknowledged, citing this Court's *Santobello* decision, "the Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation and immunity agreements—to the extent the agreements require defendants to sacrifice constitutional rights." (Pet. App. 13a.)

on that promise, after performing their end of the bargain.[12] Authorizing federal courts to review such agreements, and to order specific performance if no breach occurred, does not transgress the Constitution's delegation of authority to the Executive Branch to conduct investigations and present criminal charges.[13] It does, however, ensure that before an

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[12] It is undisputed that petitioners fully cooperated with the government and that the information they supplied helped convict two major corporations of wrongdoing. In such circumstances, it is difficult to understand how the government could find any breach of the agreement material, for "the less the non-breaching party is deprived of the expected benefits, the less material the breach." *United States v. Casteneda*, 162 F.3d 832, 837 (5th Cir. 1998).

[13] While the court of appeals found this Court's rulings in *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (*per curiam*), and *Parr v. United States*, 351 U.S. 513 (1956), "instructive" because they "reinforce the narrowness of a defendant's ability to challenge the Government's decision to pursue a prosecution," those cases are not apposite. *Hollywood Motor Car* barred raising a vindictive prosecution claim in an interlocutory appeal to halt an ongoing prosecution. *Parr* barred an interlocutory appeal of an order dismissing an indictment. These cases did not involve the construction of an immunity agreement in which a corporation was assured it would not be indicted, but only whether certain orders were final judgments within the meaning of 28 U.S.C. 1291. The government's citation of the 1910 case *Heike v. United States*, 217 U.S. 423 (1910), is also flawed. *Heike* involved a statutory grant of immunity to persons who fell into a particular defined class. This Court simply held that an interlocutory appeal, prior to trial, was not available to individuals in that class.

Nonetheless, if any collateral order decisions are relevant, they are surely the rulings of this Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), permitting interlocutory appeals of orders denying official immunity. Those decisions are founded on the Court's recognition that the immunity doctrine protects an official from the burdens of both discovery and trial, rights that would be effectively lost if an interlocutory appeal of a denial of immunity was not available. The Antitrust Division's Leniency Policy is by its own terms an immunity from all criminal prosecution, including indictment. This immunity would also be irrevocably lost if the government could, without

indictment triggers what is often devastating harm, a corporation may have a court review whether a breach of the agreement occurred.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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regard to the terms of its bargain, seek an indictment after it had covenanted not to do so.